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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030, RM-8029

TO: The Commission

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation ("GTE"), on behalf of its domestic, affiliated service companies, hereby replies to the comments on the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned matter.¹

In its comments, GTE urged the Commission, if the agency is to implement Expanded Mobile Service Provider ("EMSP") licensing in the Specialized Mobile Radio ("SMR") service, as proposed in the *Notice*, to do so in a way that ensures regulatory parity between SMR systems and common carrier mobile service providers.² Other commenters join GTE in its call for a regulatory environment that treats providers of competitive services in an equitable manner.³ Given the support in the record for the EMSP concept, which the Commission envisions will

¹ *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket 93-144, FCC 93-257 (June 9, 1993) (Notice of Proposed Rulemaking).

² Comments of GTE Service Corporation, PR Docket No. 93-144 (filed July 19, 1993) (Comments of GTE).

³ *See, e.g.*, Comments of Southwestern Bell Corporation, PR Docket No. 93-144 at 3-4 (filed July 19, 1993) (Comments of SBC).

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promote a "wide variety of services . . . including extensive interconnection with the public switched telephone network, transmission of data, and various personal communications services,"⁴ it is even more imperative that the Commission implement regulatory parity in parallel with the major enhancement to the SMR service contemplated in this proceeding.⁵

Concomitant with its call for regulatory parity, GTE supports the request of several parties for the elimination of the wireline exclusion on SMR licensing in general, and EMSP licensing in particular.⁶ As a number of these parties explain in detail, the Commission has unfinished business on this issue which should be completed before formalizing EMSP rules in the 800 MHz band, assuming they are otherwise in the public interest. Specifically, the FCC has before it two petitions for reconsideration of its 1992 decision terminating its proceeding in PR Docket No. 86-3, in which the FCC had proposed to eliminate the exclusion, thus maintaining the current wireline ban.⁷

⁴ Notice ¶ 37.

⁵ One commenter, Radiofone, Inc., opposes the EMSP proposal on the grounds that the contemplated rule changes would fundamentally change the nature of the SMR service. Radiofone urges the Commission to keep common carrier and private land mobile radio services operationally and regulatorily distinct. *See generally* Comments of Radiofone, Inc., PR Docket No. 93-144 (filed July 19, 1993). GTE suggests that it is too late in the day for the FCC to confine the SMR services to traditional dispatch services for which they were first authorized twenty years ago. The public interest would be better served by the establishment of regulatory parity and full competition among mobile service providers on an equitable basis.

⁶ *See* Comments of SWB at 4-12; Comments of PacTel Paging, PR Docket No. 93-144 at 2, n.3 (filed July 19, 1993) (Comments of PacTel Paging); Comments of Bell Atlantic Enterprises International, Inc., PR Docket No. 93-144 at 2-4 (filed July 19, 1993) (Comments of BAEI); Comments of BellSouth Corporation, PR Docket No. 93-144 at 5-12 (filed July 19, 1993) (Comments of BellSouth). *Accord* Comments of GTE at 7 n.14.

⁷ *SMR Eligibility*, 7 F.C.C. Rcd 4398 (1992) (*Order*). The petitions for reconsideration were filed by Southwestern Bell and BAEI. In addition, BellSouth has sought judicial review; its petition for review has been held in abeyance pending the outcome of the two petitions for reconsideration.

What makes the request for removal of the exclusion so compelling is that the Commission admittedly did not articulate a rationale for the wireline ban when it was adopted in 1974,⁸ and concluded in Docket 86-3 that the exclusion was no longer supportable under any of the possible original rationales for the rule.⁹ The FCC terminated the proceeding in the absence of a record-based determination whether the wireline ban should be continued, citing the fact that the rapid growth of the SMR industry since 1986 had made the record developed in Docket 86-3 irrelevant.¹⁰ Nevertheless, the Commission retained the rule, offering a new, *post hoc* rationalization for it, namely that the agency wanted to "evaluate fully the competitive potential of private land mobile services vis-a-vis common carrier land mobile providers."¹¹

It is well-established that, if the circumstances warranting the establishment of a rule in the first instance have changed, the rule no longer maintains its validity.¹² Therefore, because the Commission had not articulated a basis for the rule in the first instance and it recognized that the possible, albeit silent, rationales for the rule no longer are sound, it follows that the FCC could maintain the exclusion only if the record developed in Docket 86-3 supported it. However, the FCC dismissed that record as no longer having relevance and maintained the

⁸ See *id.* at 4398.

⁹ *Id.*; see also *SMR Eligibility*, PR Docket No. 86-3, 51 Fed. Reg. 2910 ¶¶ 5-6 (Jan. 22, 1986) (Notice of Proposed Rulemaking).

¹⁰ *Order*, 7 F.C.C. Rcd at 4399.

¹¹ *Id.*

¹² *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (just as a statute may become invalid if a "premise extant at the time of enactment . . . disappears" so too may the Commission's regulations); accord *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

wireline ban without first seeking to update the record. GTE agrees with BellSouth, BAEI, and Southwestern Bell that this does not constitute reasoned decision making as required by the Administrative Procedure Act, and that the current wireline exclusion is suspect as a matter of law.

Further, from a policy perspective, GTE submits that the effect of the rule is not to promote competition in any sense, but rather to hamstring it by excluding an entire class of potential market entrants. As the Commission noted when terminating Docket 86-3, SMRs are fast becoming "innovative and viable competitors" to common carriers,¹³ such that wireline entry should be a stimulus to further development. The adverse effects of the ban are particularly salient with respect to SMR licensing outside the respective wireline (and possibly common carrier mobile) service areas of the companies affected.¹⁴ In such cases, the operation of the ban unequivocally deprives the public of potential additional mobile service providers without any countervailing benefit.¹⁵

¹³ *Order*, 7 F.C.C. Rcd at 4399.

¹⁴ Whether a company with wireline interests in a different area holds a common carrier mobile license to serve the location for which it also desires an SMR license should not be relevant. Non-wireline mobile radio common carriers currently are not affected by the ban and presumably may hold both common and private carrier licenses to serve the same area. Moreover, such a situation does not even remotely present the possibility of discriminatory interconnection.

¹⁵ As a number of the commenters have noted, several wireline common carriers have held SMR licenses under waivers without any allegations of negative competitive affect. *See, e.g.*, Comments of SWB at 7-9 & n.10. This is not surprising given that a number of SMR service providers have operations of substantial scope and that companies such as McCaw Communications and its affiliates, the largest cellular carrier in the United States, are eligible for SMR licenses.

The Commission's primary public interest objective in this proceeding, as stated in the *Notice*, is to encourage a more efficient, innovative, and expanded SMR service.¹⁶ Moreover, the Communications Act requires the FCC to manage the private land mobile radio spectrum so as to promote competition and the provision of services to as many users as possible.¹⁷ GTE submits that the Commission may best achieve its objective and satisfy its statutory mandate through three steps: first, the agency should remove any inequitable advantages flowing to SMR service providers resulting from the disparate regulatory treatment of mobile common and private carriers. Only through fair and open competition with mobile common carriers will SMR operators provide a truly efficient and expanded SMR service.

Second, the FCC should remove the wireline exclusion from its rules governing the private land mobile radio services *before* making any additional major changes to those rules, such as EMSP licensing. Should the Commission determine, as GTE is confident a fully developed record will support, that the wireline ban should be removed as the FCC proposed seven years ago, the public interest will best be served if elimination of the exclusion is implemented prior to such a major initiative so as to allow the broadest possible competition by entities eligible for EMSP authorization. The pending petitions for reconsideration in Docket

¹⁶ *Notice* ¶¶ 1, 9.

¹⁷ 47 U.S.C. § 332(a)(3).

86-3 and the Commission's Part 88 rulemaking in PR Docket No. 92-235 both present ideal opportunities for the FCC to address in an expeditious fashion the elimination of the ban.¹⁸

Third, once the ban is lifted, the public interest would be best served if EMSP licensing was made available to all interested and qualified parties, not just incumbent licensees with constructed systems, as the *Notice* proposes. As PacTel Paging points out, restricting EMSP licensing to existing licensees could possibly "reward licensees who have not been at the forefront of development by allowing them to expand their systems without competition."¹⁹ Further, as SWB observes, such restrictive policies could effectively foreclose future competition with the initial EMSPs.²⁰ The Commission notes that "numerous SMR systems already occupy *all* 800 MHz SMR channels in many parts of the country."²¹ Thus, by suppressing full competition, narrow EMSP eligibility rules could undermine the FCC's objective of improving the efficiency of the SMR service. Moreover, the *Notice*'s proposal would be particularly unfair to wireline carriers and their affiliates, who to date have been barred from holding SMR licenses.

¹⁸ In Docket 92-235, BellSouth filed Comments demonstrating in detail both the administrative law and public policy infirmities of the wireline exclusion, as well as the reasons why the ban could be eliminated in that rulemaking. See Comments of BellSouth, PR Docket No. 92-235 at 5-23 (filed May 28, 1993). GTE supports BellSouth's analysis. See Reply Comments of GTE, PR Docket No. 92-235 (filed July 30, 1993).

¹⁹ Comments of PacTel Paging at 5 n.11. See also Comments of SWB at 19 (restricting licensing "unreasonably discriminates against new licenses that could be as able, or more so, to build out a system reusing the same channels in another part of [the EMSP] territory").

²⁰ *Id.* at 20.

²¹ *Notice* ¶ 24 (emphasis added).

Accordingly, GTE agrees with other commenters that ask the Commission not to adopt May 13, 1993 as the cut-off for EMSP license eligibility, but to provide wireline carriers and other interested entities an opportunity to acquire qualifying SMR authorizations prior to such licensing.²² In addition, as several parties contend, the Commission should not adopt the proposed three-year restriction on the transfer of EMSP authorizations.²³ In this manner, an important way for new entrants to obtain access to spectrum for EMSP authorizations will be left open. Otherwise, even if the wireline ban is lifted, it may be preserved with respect to EMSPs for practical purposes, at least in some areas, given the fact that all 800 MHz SMR frequencies have been assigned in some markets, as noted above. Unless measures such as those described herein are taken prior to EMSP licensing, many of the potential benefits of lifting the wireline exclusion will not be realized, and the SMR service may not be as effective and efficient as it could be.

For the foregoing reasons, and those set forth in its Comments, GTE urges the Commission to adopt regulatory parity in the provision of competitive land mobile radio services. Further, the Commission should remove the wireline restriction currently in its rules prior to adopting any further major rule changes enhancing the SMR services, such as those proposed in the *Notice*. In addition, the FCC should take steps to give all qualified parties a practical opportunity to apply for EMSP authorization, not just existing licensees. By promoting

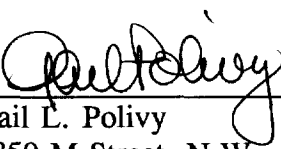
²² See, e.g., Comments of BellSouth at 10. GTE agrees with BellSouth that parties with pending applications to acquire constructed SMR systems as of the new cut-off date should be eligible for EMSP licensing.

²³ E.g., Comments of SWB at 22; Comments of BellSouth at 11-12. See *Notice* at ¶ 42.

full and equitable competition in the provision of mobile services, the FCC will ensure that the public will have the widest variety of choice at the lowest possible prices.

Respectfully submitted,

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on behalf of its domestic, affiliated
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August 5, 1993

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on the 5th day of August, 1993 to all parties on the attached list.


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